UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

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CANADIAN PACIFIC RAILWAY COMPANY, a foreign Corporation,
Appellant,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

No. 7366

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

BOGLE, BOGLE & GATES,
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Seattle, Washington.

Farwest Lithograph & Printing Co.

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STATEMENT OF THE CASE

I. Proceedings below.

This action was brought to collect compensation alleged to be payable pursuant to Sec. 109 a, b, Title 8, U. S. C. (Appendix A), for overtime immigration inspection service rendered from May 1, 1931 to September 30, 1932, to passengers arriving in the United States on appellant's daily vessels from Victoria and Vancouver,

B. C. The appellant denied liability on the grounds that it was exempt from the payment of overtime charges by reason of the following proviso of the above act:

> " * * * Provided, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules. (Mar. 2, 1931, c. 368, §2, 46 Stat. 1467)."

The District Court entered judgment for the plaintiff (R. 61), from which this appeal is prosecuted. The Findings of Fact and Conclusions of Law (R. 95, 101), hold that the appellant's vessels are not "international ferries."

II. The Facts.

The appellant company, from 1903 until the present date, has operated vessels daily between Victoria, Vancouver Island, B. C., and Seattle, Washington, and since 1908 from Vancouver, B. C., to Seattle, Washington, on regular schedules, the vessels from Victoria arriving at Seattle at 9:00 P. M. and the ones from Vancouver arriving at 7:45 A. M. (disregarding slight and immaterial changes in arrival time). The vessels carried vehicles and passengers, the vehicular traffic being driven aboard ship in the same manner as such traffic is handled on all ferry vessels, except that the entrance to the appellant's vessels is through side ports and not through openings in the bow and stern of said vessels. (Exh. 13, 14) (R. 82).

The operations of the appellant's vessels are part of a network of communications between Vancouver Island

and the mainland on the American side of the borderline, the remaining services being maintained by the Puget Sound Navigation Company, a Washington corporation, operating ferries between the mainland and San Juan Island points, between Port Angeles, Washington, and Victoria, B. C., and between Anacortes and Bellingham, Washington, and Sidney, B. C. (R. 78, 79, Exh. 18, R. 84, pictures of Puget Sound Navigation Company's ferries; Exh. 2, 3, 4, R. 77, 78, ferry schedules, and Exh. 8, R. 80, chart of the Puget Sound region showing routes of services referred to). The District Court found these vessels to be ferries because "on these ferry routes the conventional open-end type of ferry boats are used" (R. 96, 97).

Passenger tickets issued by the appellant and by the Puget Sound Navigation Company are interchangeable, so that passengers may reach Vancouver Island or the City of Vancouver, B. C., by any one of a number of routes. They can drive their cars aboard the appellant's vessels at Seattle and proceed directly to Victoria or to Vancouver or they can drive to Anacortes or Bellingham or Port Angeles on the American side of the border, and there go aboard the Puget Sound Navigation Company's ferries and proceed to Victoria or Sidney, B. C., located a few miles north of Victoria on Vancouver Island. There is no interlocking ownership, management, or identity of interests between the two companies, the above arrangement being purely cooperative. The companies are in all respects competitive.

There are regular currents of traffic in each direction

to and from Seattle, the flow being about equal in each direction. Thus, during the year from March 1, 1932, to February 28, 1933, the appellant carried 45,387 passengers and 1,498 automobiles from Vancouver and Victoria to Seattle, and 48,116 passengers and 1,132 automobiles from Seattle to Vancouver and Victoria (R. 82, 83, Exh. 15).

All inbound traffic arriving at ports of entry on Puget Sound is examined by United States Immigration Inspectors before passengers are admitted into this country. This examination has been made without charge to the carriers until the passage of the act of March 2, 1931, Sec. 109 a, b, Title 8, U. S. C., providing that carriers landing passengers in ports of entry of the United States after 5:00 P. M. and before 8:00 A. M. should pay to the Government the amount of compensation specified in the act for overtime immigration inspection service. This compensation is then paid to the inspectors who render the services. As is hereinafter shown, the act was designed to meet the rising demand for overtime immigration inspection service for trans-Atlantic carriers arriving at ports of entry at unanticipated hours, and the above quoted proviso was added to the act to exempt from its provisions the carriers named WHEN OPERATING ON REGULAR SCHEDULES over the Canadian border.

The testimony offered by the Government (R. 69, 75, Exh. C, R. 67, Exh. C-1, R. 67), shows that over 20,000,000 people were examined and admitted at ports of entry across the entire Canadian borderline during the fiscal year ending June 30, 1932, at 110 ports of entry, and that *all carriers across the border* (railroad trains, bridges,

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SPECIFICATIONS OF ERRORS

The errors assigned (R. pages 105-107) and which are relied upon on this appeal, charge that the judgment appealed from is erroneous in that:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in entering judgment for the plaintiff against the defendant for wages claimed by the plaintiff to be due and payable to United States Immigration Inspectors on account of overtime immigration inspection service rendered to passengers on the defendant's vessels arriving at Seattle, Washington, daily on regular schedules, after 5:00 P. M. and before 8:00 A. M.

2. That the said court erred in holding that defendant's vessels operating on regular schedules between Vancouver, B. C., and Seattle, and Victoria, B. C., and Seattle, were subject to the overtime immigration inspection service charges as provided in the Act of March 2, 1931 (8 U. S. C. A. 109 a, b), and in failing to hold that said vessels were exempt from the said overtime immigration inspection service charged by reason of the following proviso of the above quoted act:

> "Provided that this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes or connecting waterways, and operating on regular schedules."

3. That the said court erred in failing to find that Congress intended, in adopting the foregoing proviso of the Overtime Act, to exempt from the payment of overtime charges all vessels rendering international ferry service on regular schedules across the border line between Canada and the United States, and in failing to find that the defendant's vessels between Victoria and Seattle and Vancouver and Seattle were rendering such services, and in failing to enter the defendant's proposed findings of fact and conclusions of law.

4. That the said court erred in holding that the said vessels of the defendant were not "international ferries" within the meaning of the foregoing proviso because the defendant had no franchise to operate international ferries and because the defendant's vessels had "side ports" for the ingress and egress of vehicular traffic

instead of entrances at the bow and stern of said vessels, as is usual in the "conventional ferry boats"; and in holding that the design and construction of said vessels determine whether or not they are "international ferries" within the meaning of the proviso, and in failing to hold that the character of the service rendered and not the design of the vessels determines their status under the act and their right to exemption from overtime charges.

5. That said court erred in failing to hold that the construction placed upon the aforesaid act by the Bureau of Immigration, Department of Labor, in holding that defendant's vessels operating between Victoria and Seattle and Vancouver and Seattle were not "international ferries" entitled to exemption from overtime immigration inspection service charges, constituted an arbitrary and unlawful construction of said act which renders the same unconstitutional, in that said construction of the act constitutes an unlawful and arbitrary discrimination against this defendant and in favor of common carriers of passengers competing with the defendant and rendering the same or similar services between Canada and the United States.

6. That the said court erred in failing to enter judgment of dismissal.

7. That the said court erred in denying defendant's and appellant's motion to judgment in its favor.

tunnels, auto stages, ferries and vessels on the Great Lakes and connecting waterways) *were exempt from the payment of overtime compensation* for arrivals after 5:00 P. M. and before 8:00 A. M. when operating on regular schedules, *except the vessels of the Puget Sound Navigation Company and those of the appellant.* These vessels (Exh. 13, R. 82, Exh. 18, R. 84), are charged with overtime compensation on the ground that they are not "international ferries."

III. The Issue.

The foregoing facts and proceedings below give rise to one issue:

> IS THE APPELLANT STEAMSHIP COMPANY EXEMPT FROM THE PAYMENT OF COMPENSATION FOR OVERTIME IMMIGRATION INSPECTION SERVICE RENDERED TO PASSENGERS ARRIVING AT SEATTLE ON ITS VESSELS FROM VICTORIA AND VANCOUVER, B. C., AT 9:00 P. M. AND 7:45 A. M. RESPECTIVELY EACH DAY UNDER THE PROVISO OF SECTION 109 B, TITLE 8, U. S. C.?

ARGUMENT

I. CONSTRUCTION OF THE ACT

1. Authorities and rules of construction; error of the District Court.

Before determining the meaning and purpose of the proviso above quoted, it should be noted that the decision of the District Court is squarely opposed to a decision of the Supreme Court not cited by the lower court. Judgment against the appellant was based primarily upon the grounds that a ferry line is "a creation of local

franchise after finding of necessity" and that the "defendant has no license or franchise to operate a ferry within the boundaries of the State of Washington."

The Supreme Court in *Sault Ste. Marie v. International Transit Co.* (1914), 234 U. S. 333, 58 L. ed. 1337, held to the contrary that a state has no power to issue a franchise for international ferries. An ordinance of the City of Sault Ste. Marie required that anyone operating a ferry should secure a license. The operator of one of the International Transit Company's ferry boats operating between Michigan and Canada was arrested for failure to secure a license. The Supreme Court, speaking through Mr. Justice Hughes, said, at page 340:

> "The ordinance requires a municipal license; and the fundamental question is whether, in the circumstances shown, the state, or the city, acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. * * * Has the state of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee? This question must be answered in the negative."

And at page 341:

> "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

See also:

Port Richmond Ferry Co. v. Freeholders of H. County (1914), 234 U. S. 317, 58 L. ed. 1330.

The foregoing decisions render erroneous the principal finding of the District Court upon which judgment was predicated. The secondary grounds for the court's decision was the size and construction of the appellant's vessels which the court held precluded them from being ferries (R. 99).

Before showing that the District Court was equally in error in its secondary reasons for judgment against the appellant, it should be noted that the phrase "international ferry" is new in the law, and is not defined in the act nor in any decision which either counsel could discover. The word "ferry" itself has been subject to a wide variety of definitions, the narrowest of which, adopted by the District Court, defeats the evident purpose of the act.

What then did Congress mean in the above quoted proviso by referring to "international ferries?"

Rules of statutory construction were clearly laid down in the case of *Church of the Holy Trinity v. United States* (1891), 143 U. S. 457. There the question was whether an act "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States" applied to a contract between a rector or minister and an incorporated American religious society, whereby the former was to be engaged as the minister of the latter society. The act excluded any foreigners who were "to perform labor or services of

any kind in the United States" under contract. The court said, at page 459:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."
>
> * * *

And at page 463:

> "*Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.*"
>
> * * *

And again at page 464:

> "It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. *So far, then, as the evil which was sought to be*

remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

"A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee * * * ."

The rules laid down in the above decision have been repeatedly applied to accomplish the aims of the legislature. Thus, in *Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission* (1912), 230 U. S. 323, 57 L. ed. 1501, the question was whether or not the word "railroad" applied to a street railway chartered as such under the laws of Iowa and operating lines across the Missouri River from Council Bluffs to Omaha. The Interstate Commerce Commission ordered a reduction in rates. The company sought to enjoin enforcement of the order. The court pointed out the conflict of authorities as to the meaning of the word "railroad," some having applied the term solely to steam railroads and others to street railroads, and said, at page 334:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

The court pointed out that the various provisions of the Interstate Commerce Act applied peculiarly to railroads hauling passengers between states and not to street railways, and then held that, "street railroads not

being guilty of the mischief sought to be corrected" and "the remedial provisions of the statute not being applicable to them," they were not intended to be within the meaning of the word "railroad."

On the contrary, the word "railroad" was held to include street railways within the intent and purpose of a provision of the Bankruptcy Act, barring certain enterprises from its benefits in the case of *In re Columbia Railway, Gas & Electric Company* (1928), 24 F. (2d) 828. The court said, at page 831:

> "If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroads. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. *Omaha St. Ry. Co. v. Interstate Commerce Comm.*, 230 U. S. 324, 335, 33 S. Ct. 890, 57 L. ed. 1501.
>
> * * *
>
> " * * * It is obvious that, if railroads were allowed to become bankrupts, many and serious difficulties would arise as to their right to be freed from their obligations as public servants, and large communities that depended upon them would be put to great inconvenience, if not to absolute disaster. Every consideration which applies to railroads generally in this respect applies also to street railways. The consequences would be different in degree and intensity merely, not in quality or kind. * * * ."

In the case of *W. O. Johnson v. Southern Pacific Company* (1904), 196 U. S. 1, 49 L. ed. 363, an act requiring automatic couplers to be provided for all cars and making it unlawful for any carrier to haul on its line "any car" not equipped with such couplers was construed. The

question was whether a locomotive was in fact a "car" within the meaning of the last quoted phrase. The Supreme Court said in quoting Mr. Justice Story, at page 18:

> "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that *the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.*"* * *
>
> "The risk in coupling and uncoupling was the evil sought to be remedied, * * * ."
>
> "That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer."

The rules of construction as contended for above were reviewed in the recent decision of *Sorrels v. United States of America* (1932), 287 U. S. 435, 77 L. ed. 413, in which the court said, at page 419, quoting from *U. S. v. Kirby*, 7 Wall 482:

> "*Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. * * * 'It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character.* The reason of the law in such case should prevail over its letter.' "

As stated in *Stevens v. Nave-M'Cord Mercantile Co.*, (C. C. A. 8, 1906), 150 Fed. 71, at page 75:

> " * * * Cardinal rules for the construction of a statute are that *the intention of the legislative body which enacted it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deduced not from a part but from the entire law; that the object which the enacting body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention;* that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong."

There are two main sources of determining the intent of the legislature: (1) debates in Congress and (2) committee reports. There is no longer any question whatsoever but that the court may resort to the reports of committees to determine the evil aimed at and the intent of Congress in the passing of an act.

U. S. v. St. Paul M. & M. Ry. Co. (1917), 247 U. S. 310, 62 L. ed. 1130;

Omaechevarria v. Idaho (1918), 246 U. S. 343, 62 L. ed. 763 at page 769, note 12;

McLean v. United States (1912), 226 U. S. 374, 57 L. ed. 260;

Oceanic Steam Navigation Co. v. Stranahan (1909), 214 U. S. 320, 53 L. ed. 1013, at 1019;

Northern Pacific Railway Co. v. Washington (1911), 222 U. S. 370, 56 L. ed. 237;

Duplex Co. v. Deering (1921), 254 U. S. 443, 474, 475, 65 L. ed. 349.

As said in *Binns v. United States* (1904), 194 U. S. 486, 48 L. ed. 1087, at page 495:

> "We have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports."

In respect to debates in Congress it is now firmly established that debates may be resorted to where substantial unanimity of purpose is expressed. As stated in *Federal Trade Commission v. Raladam Co.* (1931), 283 U. S. 643, 75 L. ed. 1324, at page 650:

> "The fact that throughout the consideration of this legislation there was common agreement in the debate as to the great purpose of the Act may be properly considered in determining what that purpose was and what were the evils sought to be remedied."

Examination of the debates in Congress on the bill here considered shows a clear unanimity of opinion and desire to exempt the regular scheduled traffic between Canada and the United States from the provisions of the overtime law. We refer to the committee reports and debates in Congress.

2. Intention of Congress; purpose of the Act and Proviso.

There are six specific exemptions from the overtime act by force of the proviso at issue in this case:

1. International ferries,
2. Bridges,
3. Tunnels,
4. Aircraft,
5. Railroad trains,
6. Vessels on the Great Lakes and connecting waterways;

when operating on regular schedules.

Before showing that the defendant's service is in fact an international ferry service and that the construction placed upon the act by the Immigration Service in effect repeals the first exemption named above, by refusing to recognize any service as international ferry service, we note the history and purpose of the act.

For many years the Customs Service has collected overtime charges from certain carriers (Sec. 267, Title 19, U. S. C.), but there is no proviso in the Customs Law such as that quoted above. An act almost identical with that of the Customs Overtime Act was introduced by Senator Reed of Pennsylvania, in the Senate on May 14, 1929 (S. R. 1126, Exh. 11, R. 81), and on May 24, 1929, an identical bill was introduced in the House (H. R. 3309, Exh. 11, R. 81), and both bills were referred to the Senate and House Committees on Immigration. In the House, the bill was reluctantly given a favorable report by the Committee, Representative Johnson of Washington, explaining, when the matter was first

opened for debate on June 9, 1930 (Congressional Record 10320), that:

> "Our Committee finally came to the conclusion that if it is paid in the Customs Service it should be applied to this service also. We do not like the system at all. The government is able to pay its inspectors in all services. But we cannot get rid of the privately paid overtime in the great, big Customs Service, so our Committee asks that you let the smaller Immigration Service 'hook on' to their system."

The matter was continued without further debate until June 16, 1930, when the bill again came up for discussion (Congressional Record 10907), and Representative Jenkins, who had introduced the bill, explained it as follows:

> MR. JENKINS: " * * * It is identical with the Customs law."
>
> MR. CRAMPTON: "Well, there is quite a question about the Customs situation, whether that is the way it ought to be or not."
>
> MR. JENKINS: "That is true, and because of that it is thought wise to insert an amendment in the bill restricting and controlling immigration across international bridges. I have such an amendment prepared, and if that is the only objection the gentleman has I will be glad to introduce the amendment, because I think it will clarify the whole situation."
>
> * * *
>
> MR. CRAMPTON: " * * * But what about international ferries? They run regularly; it is not an emergency but it is a regular thing."

A proviso was then read providing that the overtime act should not apply to international bridges, ferries, or

railroad trains operating on regular schedules, after which the following discussion took place, Mr. La Guardia referring to the proviso:

> MR. LA GUARDIA: "It would not apply to ocean steamers."
>
> MR. STAFFORD: "No. I wish this law to apply to ocean steamers, and I want to limit it to ocean traffic conditions."
>
> MR. CRAMPTON: " * * * If we have an amendment that the provisions of this act relating to extra compensation shall not apply to international bridges or ferries or railroad trains operating on regular schedules, it would seem to me that would reach the whole thing."
>
> MR. STAFFORD: "Not only the railroad train crossing the border is concerned *but any regular established service across the border*, and these men should not be privileged to exact two and one-half times their salary for just an hour's additional work. *It is only intended to apply to ocean service and that is the main consideration*" (Congressional Record 10908).
>
> " * * *
>
> MR. LA GUARDIA: "Mr. Speaker, *I want to ask the gentleman from Wisconsin if the purpose of the gentleman's amendment is to eliminate the extra time, particularly on the border, where the regular schedule is in operation?*
>
> MR. STAFFORD: "That is the purpose."
>
> MR. LA GUARDIA: "There is nothing in the amendment which in any way changes the purpose of the bill in its application to general steamship lines?"
>
> MR. STAFFORD: "No." (Congressional Record 10909).

That the bill was aimed at ocean-going vessels putting

into port at irregular hours and requiring the services of United States immigration inspectors after 5 P. M. and before 8 A. M. is clearly shown by the report of Mr. Gould from the Committee on Immigration in the House (Report No. 1720, Exh. 11, R. 81), in which the bill with amendment was finally reported to the House on February 21, 1931, with all of the exemptions first listed above incorporated therein. This report recites the facts in regard to increased overtime services as follows:

"The committee has found that overtime duty of immigration officers has increased steadily in recent years. The following figures show the steady, substantial increase in the work at the port of New York during the past five years:

	1925	1926	1927	1928	1929
Ships boarded	4,961	5,204	5,369	5,426	5,640
Passengers and seamen examined	894,338	1,016,954	1,119,466	1,198,261	1,208,123

"The first nine months of the current fiscal year show an increase at the same port over the corresponding period of last year in the number of persons inspected of 41,575. Naturally, with increased volume of arrivals have come increased demands for overtime services.

"The following summary for the month of March, 1930, at the port of New York, is both recent and informative on the subject of overtime:

"Arriving passenger steamers from foreign ports requiring assignment of immigration inspectors 278
"Number of same requiring overtime duty 41
"Number of inspectors performing overtime, each occasion 1 to 16
"Total number of overtime hours in which inspection occurred 130
"Grand total hours of overtime of all inspectors 833"

It is quite impossible to bring the appellant's service within the mischief aimed at by the overtime act. Appellant's vessels do not operate in transoceanic traffic; they do not arrive at unexpected hours; and they have caused no increase in the overtime services required for the past sixteen to twenty years. The two daily arrivals have remained as follows (except for minor and immaterial changes):

> Victoria boat, daily since 1903—9:00 P. M.
>
> Vancouver boat, daily since 1908—7:45 A. M. (until September, 1932, when arrival was changed to 8:00 A. M. to avoid overtime charge).

The evil aimed at in the act, as revealed by the above quoted committee reports and debates in the House and Senate, was the increasing number of overtime inspection hours rendered to passenger vessels from foreign ports—*a total of* 130 *hours of service in March*, 1930, *in New York, rendered to* 278 *vessels from foreign ports*. These were the ocean steamers referred to by Mr. Stafford arriving at unexpected hours, and not the "regular established service across the border" such as that of the defendant, which has been carried on unchanged for years *without increase in the amount of overtime and with the same vessels arriving at the same hour, each day.*

Of the numerous transportation services across the Canadian border described in appellee's testimony (Exh. C, C-1), there are many schedules which have more than two overtime arrivals per day, requiring much more than 130 hours of inspection service per day for many ports of entry, but this service is supplied as it is in any

private industry requiring night work, *by arranging the working day of certain inspectors to meet the regular scheduled traffic arriving after* 5:00 *P. M.* This is the spirit and intention of the proviso at issue, as manifest by the Immigration Department's own instructions (Exh. 12, p. 4, par. (n), R. 82):

> "Commissioners and district directors of immigration will arrange schedules and working hours of inspectors and employees of the Immigration Service so as to avoid overtime within this order, as far as possible consistent with the due enforcement of the Immigration Law and the convenience of persons arriving in the United States * * * ."

These instructions from the Department are perfectly in accord with the statements of Senator Reed, of Pennsylvania, explaining the act before the Committee on Immigration in the United States Senate (S. R. 1126, Exh. 11, p. 3, R. 81):

> " * * * Where you are inspecting ocean liners that come in on a schedule only they are exempt. But there are other vessels nobody can tell whether they will get in at 3 o'clock in the afternoon or at 11 o'clock in the evening. There the Government cannot be expected to keep on several shifts on a chance the steamer will come in that way, and we cannot reasonably expect the Government, and it is not economical, to keep the two shifts on. But where you have a situation as we have it at Detroit, Mich., with trains coming across the border all night long on regular schedules, that is one kind of situation.
>
> "In the first place, it is not reasonable to expect men to work overtime every day, and in the next place the Government knows the trains are coming in in the middle of the night, and it ought to run two shifts of men. It seems to me that is the situation

there, and it is not fair to force the railroad company to pay the overtime required for these regular scheduled trains, while it is fair to assess it upon steamships arriving irregularly, if they want to get rid of their passengers.

" * * *

"The steamships do not have to pay overtime, because if they do not want to they can keep the ship at quarantine and take it into dock the next day."

By ignoring the avowed and repeatedly expressed purpose of the proviso, recognized even in the Immigration Department's own regulations quoted above, and by standing upon a technical and narrow definition of the word "ferry," to be hereinafter discussed, the Department of Immigration has held that of all the regular scheduled traffic across the border between the United States and Canada, the vessels of the appellant (Exh. 13, 14, R. 82) and of the Puget Sound Navigation Company (Exh. 18, R. 84) are not "international ferries" and are therefore not entitled to the exemption.

Note the absurdity in which this construction results: For the fiscal year ending June 30, 1932, a part of the period in controversy, the following applicants were admitted at the Port of Seattle from the steamship companies named below:

Canadian Pacific Railway Company (appellant) vessels from Victoria and Vancouver	71,540
Puget Sound Navigation Company vessels	7,119
All other vessels	147
	78,808

(R. 75).

Inasmuch as the only vessels of the appellant arriving in Seattle during the period at issue were the two arrivals at 9:00 P. M. and 7:45 A. M., and inasmuch as the Puget Sound Navigation Company has only one vessel arriving from Victoria, at about 6:00 P. M. (Exh. 4, R. 78), *all of the above applicants arrived during overtime hours except for arrivals on three excursion trips* (for which appellant paid (Exh. B, R. 66), *and except for* 149 *arrivals on all carriers other than the Puget Sound Navigation Company and the appellant.*

Thus 90% of the entire work of the Immigration Service at the Port of Seattle for the fiscal year ending June 30, 1932, was rendered to the vessels of the appellant. Of these vessels all but three on excursion trips arrived after 5:00 P. M. and before 8:00 A. M. If the judgment below is sustained, the appellant, a foreign steamship company, will be compelled to pay at the high rate of overtime pay for approximately 90% of the immigration inspection work done at the Port of Seattle.

Thus the exercise of an important prerogative of government, that of supervising and controlling the entry into the country of all persons seeking admission, would be subsidized at the Port of Seattle by two corporations, the appellant Canadian Pacific Railway Company, and the Puget Sound Navigation Company which would have to pay for approximately 9% of such work. The Government apparently would pay for only 1% of the work done, based upon the figures for the fiscal year ending June 30, 1932.

Note, too, how oppressive and unreasonable the result

is when the amount of overtime charge is compared to the passenger revenues received by the appellant from January, 1932, to the end of June, a period of six months:

Passengers carried to Seattle	19,659
Gross revenues from passenger tickets	$46,465.55
Overtime charge	$2,127.53
Percentage of overtime charges to gross revenue	4½%

(Exh. 17, R. 84).

If the percentage were figured on net instead of gross income, the charge would amount to a substantial income tax.

Is it reasonable to suppose that Congress intended to impose such a burden on two carriers only along the Canadian-American border line, when competing carriers serving the same territory and the same traffic, rendering the same or similar service, to-wit, the railroads, auto stages and airplanes traveling to and from Vancouver and Seattle or Victoria and Seattle, are exempt from such charges?

It is submitted that the construction placed upon the proviso by the District Court squarely opposes the intention of Congress and the evident purpose of the overtime act, violates established rules of statutory construction and results in absurd and inequitable consequences.

3. Meaning of the words "International Ferry."

For all of the foregoing reasons the appellant's vessels come clearly within the spirit and purpose of the act

exempting regular scheduled service from payment of overtime charges, but can they be brought within the letter of the law?

As has been pointed out above, the words *international ferry* are new in the law and undefined, but voluminous authorities have defined the word *ferry*. Without referring to any of the latter, the District Court laid down three requirements for a "ferry" (R. 95, 101):

> 1. FRANCHISE: There must be a franchise or license to operate.
>
> 2. CHARACTER OF SERVICE: The ferry must offer a "service of necessity" for common good, in continuation of a highway across rivers or bodies of water.
>
> 3. CONSTRUCTION: The ferry boat must be especially constructed with open ends to admit vehicular traffic.

THE FRANCHISE

In respect to the first point, the District Court is entirely correct. The franchise is the most essential element in the definition of "ferry." It is said in many decisions that *a ferry is a franchise.* At common law a ferry could not operate without a franchise from the king. (1).

See: "Original and Monopoly Rights of Ancient Ferries," 63 U. of Penn. L. R. 718-53.

(1) The modern definition in England, as given in "The Laws of England" by the Earl of Halsbury, Vol. 14, page 555, is restricted as follows: "A public ferry is a public highway of a special description whose termini must be in places where the public have rights, such as towns or vills, or highways leading to towns or vills. In the one case, the grantee of the ferry has the exclusive right to carry passengers, animals, or goods over a river or arm of the sea from town to town; in the other he has a similar right to carry from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. * * * A ferry is created by Royal grant, or in modern days by Act of Parliament, or exists by prescription, which implies a Royal Grant" (page 557). See also Meir's Digest of English Case Law, Vol. 9, page 858, and The English v. Empire Digest, Vol. 24, page 968.

In this country the grant of a franchise by the state or municipality has always been the foundation of ferry rights. As stated in *Fort Richmond and B. P. Ferry Co. v. Board of Freeholders* (1914), 234 U. S. 317, 58 L. ed. 1330, at page 321:

> "At common law, the right to maintain a public ferry lies in franchise; in England such a ferry could not be set up without the King's license; and in this country the right has been made the subject of legislative grant."

The element of exclusive franchise is fundamental in all definitions of a ferry.

As stated in *Mills v. St. Clair Co.*, 7 Ill. 197:

> "The grant of a ferry franchise by the sovereign is of very ancient origin, and it has always been the rule that the privilege was exclusive. No one is permitted to run another ferry within a prescribed or reasonable distance from the ferry established by franchise, and one so doing in injury to the business of the franchised ferry will be enjoined."

It is virtually impossible to define a "ferry" without reference to a franchise or license to operate. To attempt to do so is like defining a railroad without reference to the railroad track. The track in the one case and the franchise in the other is the foundation of the definition.

See 59 L. R. A. 513-56; L. R. A. 1916-D 832, for exhaustive annotations regarding ferries.

In bringing innumerable definitions of the word "ferry" to aid in determining what is an "international ferry," we are therefore completely at loss, inasmuch as

there can be no franchise for a ferry operating from one of the United States to Canada. As stated by the Supreme Court, in holding that a franchise could not be granted by the State of Michigan for operating a ferry to and from Canada at Sault Ste. Marie:

> "Has the State of Michigan the right to make this commercial intercourse a matter of local privilege to demand that it shall not be carried on without its permission, and to exact as the price of its consent —if it chooses to give it—the payment of a license fee? This question must be answered in the negative." (*Sault Ste. Marie v. International Transit Co.* (1914), 234 U. S. 333, 58 L. ed. 1337.

The act at issue here was passed after the foregoing decision had established the law for 17 years on the subject of ferries operating between Canada and the United States. In view of this decision, Congress could not have intended to embrace in the words "international ferries" the ancient and accepted definition of a "ferry" as a franchise right. What, then, is left in the definition of the word "ferry" which could sustain the conclusions of the District Court or assist in determining the meaning of the words "international ferry."

CHARACTER OF SERVICE RENDERED; TYPE OF VESSEL

The word "ferry" has not been narrowly defined in this country as in England, possibly due to the presence of larger bodies of water than were common in England. Thus, in Washburn on Real Property (5th Ed., Vol. 2, p. 305), ferries are defined as:

> "The right of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by way of a toll."

As stated in the frequently cited leading case of *Mayor of the City of New York v. Starin* (1887, Ct. of App. N. Y.), 106 N. Y. 11, 12 N. E. 631, at page 632:

> "A ferry is a continuation of the highway from one side of the water over which it passes to the other and is for the transportation of passengers or of travelers with their teams and vehicles, and such other property as they may carry or have with them."
>
> *Broadnax v. Baker* (1886), 94 N. C. 675, 55 Am. Rep. 633, cited with approval in *County of St. Clair v. Interstate Sand & Car Transfer Company* (1903), 192 U. S. 453, 48 L. ed. 519 at 524.

It was further stated on page 632 in the Starin case that:

> "In a strictly ferry business, property is always transported only with the owner or custodian thereof; the ferry-men who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property; and, in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to due care and diligence. *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32. But they may combine, and usually do combine, with the ferry business the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and as to such freight, they are under the duties and obligations of a common carrier. As ferry-men they are under a public duty to transport, with suitable care and diligence, all persons with or without their vehicles and other property; and as common carriers it is

their duty to carry all freight and merchandise delivered to them."

Bouvier's Law Dictionary defines a ferry as:

> "A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents for a reasonable toll. * * * Ferries properly mean the place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river or arm of the sea from one vill to another, or to connect a continuous line of road leading from one township or vill to another."
>
> *Alexandria Warsaw & Keokuk Ferry Co. v. Wisch*, (1881), 39 Am. Rep. 535, 73 Mo. 655.

As was stated in *Broadnax v. Baker* (1886), 94 N. C. 675, 55 Am. Rep. 633:

> "A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be 'a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll,' adding 'it is usually to cross a large river.' Tomlin Law Dict.
>
> "*It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water*, the essential idea of passing from one shore to an opposite shore being retained."

The broader definition of the American Courts is also reflected in the statutory definition of the California Political Code, Section 3643, in which a ferry is defined as:

> "A vessel traversing across any of the waters of the State between two constant points regularly employed for transfer of passengers and freight, authorized by law to do so * * * ."

It is clear that a ferry may operate between three points as well as two.

Mayor of the City of New York v. New Jersey Steamboat Transportation Company (1887, Court of Appeals of New York), 106 N. Y. 28, 12 N. E. 435.

In none of the definitions of "ferry" just stated is there any limitation upon the size of the body of water crossed, so long as it be inland, lake, bay or arm of the sea. By the very nature of the service required of a ferry there could be no arbitrary limitation. The *raison d'etre* of a ferry arises from the geography of the country. A glance at Exh. 8, R. 80, shows the Puget Sound region to be severed and broken up by an inlet of the sea completely embraced by land. There is a network of communication by ferries back and forth across the sound, and among the San Juan Islands, and between the mainland and Vancouver Island.

The District Court recognized that these services of the Puget Sound Navigation Company constitute international passenger ferry service (Exh. 13, R. 82, Exh. 18, R. 84, 96, 97), and that the appellant's vessels between Nanaimo and Vancouver Island were ferry vessels, but held that appellant's vessels from Victoria to Seattle were not ferries. The Puget Sound Navigation Company vessel operating from Port Angeles to Sidney, B. C., is held to be a "ferry" (R. 96, 97), but the same vessel operates between Seattle and Victoria. Does it cease to be a "ferry" on the latter run merely because the distance is greater, and if so at what point on the course does the metamorphosis take place?

It is also said that the runs between Seattle and Victoria are merely "scenic" passenger trips (R. 99). Every ferry on Puget Sound offers a scenic passenger trip, particularly

the Puget Sound Navigation Company trips through the San Juan Islands to Sidney, B. C., which the District Court admitted were ferry services. There is no substance in the court's objection that the trip is a scenic one.

Lastly, the District Court's requirement that vessels be "specially constructed" (R. 99) with open ends (R. 96) is not sustained by any authority whatsoever. In none of the decisions or annotations referred to above is there any suggestion as to the style of construction of a ferry vessel. *The character of the service rendered and not the design of the vessel is the determining feature.* Whether the vessel opens at the end or on its side is entirely immaterial, so long as passengers, their baggage and vehicles are transported from one point to another across a body of water.

Nor is it suggested in any of the foregoing decisions that the ferry is "a way of necessity," although this phrase appears in some of the very early decisions dealing with ferries across rivers or streams. The phrase is clearly obsolete; otherwise the presence of numerous bridges across the Hudson river in New York City would divest all of the ferries of their status as ferries because they were no longer "ways of necessity" across the water.

CONCLUSION

It is respectfully submitted that the operations of the appellant came within both the letter and spirit of the exempting proviso of Sec. 109 b, Title 8, U. S. C. and being thus exempt from immigration overtime payments the judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX "A"

§109a, Title 8, U. S. C. Officers and employees; overtime services; extra compensation; length of working day. The Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed. (Mar. 2, 1931, c. 368, §1, 46 Stat. 1467).

§109b. Same; extra compensation; payment. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other con-

veyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in section 109a of this title. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided*, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules. (Mar. 2, 1931, c. 368, §2, 46 Stat. 1467).